72-967

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Supreme Court, U. S.
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In The Supreme Court of the United States

No. 72-967

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia corporation, *Petitioner,*

vs.

PAUL J. GRECO, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH P. MILTON
CLARK W. TOOLE, JR.

Toole, Taylor, Moseley, Gabel & Milton
Suite 1014, Barnett Bank Building
Jacksonville, Florida 32202

Counsel for Petitioner

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In The Supreme Court of the United States

No.

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia corporation, *Petitioner,*

vs.

PAUL J. GRECO, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Seaboard Coast Line Railroad Company, a Virginia corporation, Petitioner, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 12, 1972.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix "B" is reported at 464 F.2d 496.

The Opinion of the United States Court of Appeals for the Fifth Circuit, denying the Petition for Rehearing and Petition for Rehearing En Banc, printed in Appendix "A" is reported at ..... F.2d ..... The Opinion of the Judge of the United States District Court, Middle District of Florida, denying Defendant's Motion for Judgment not withstanding verdict or, in the alternative, for new trial, or remittitur, printed in Appendix "D" is unreported.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit was dated July 12, 1972.

The Petition for Rehearing and Petition for Rehearing En Banc was denied by the United States Court of Appeals for the Fifth Circuit on October 11, 1972. Pursuant to timely Motion by Petitioner, the United States Court of Appeals for the Fifth Circuit has stayed the mandate to and including January 9, 1973.

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254 (1) U.S.C.A.

QUESTIONS PRESENTED

1. Was the Petitioner entitled to have the jury charged that any compensatory damages awarded to Respondent were not subject to income tax?

2. Did the trial court's refusal to instruct the jury, in an action under the Federal Employers' Liability Act, that compensatory damages awarded to Respondent were not subject to Federal Income Tax deprive the Petitioner of due process of law as provided for by the Fifth Amendment of the United States Constitution?

STATUTE INVOLVED

The following statute is involved:

26 U.S.C.A. § 104 (Gross Income -- Exclusions):

"Compensation for injuries or sickness

(a) In general. -- Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include --

(1) amounts received under workmen's compensation acts as compensation for personal injuries or sickness;

(2) *the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness;* (Emphasis added)

(3) amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer); and

(4) amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country or in the Coast and Geodetic Survey or the Public Health Service, or as a disability annuity payable under the provisions of section 831 of the Foreign Service Act of 1946, as amended (22 U.S.C. 1081; 60 Stat. 1021).

For purposes of paragraph (3), in the case of an individual who is, or has been, an employee within the meaning of section 401(c) (1) (relating to self-employed individuals), contributions made on behalf of such individual while he was such an employee to a trust described in section 401(a) which is exempt from tax under section 501(a), or under a plan described in section 403(a), shall, to the extent allowed as deductions under section 404, be treated as contributions by the employer which were not includible in the gross income of the employee."

STATEMENT OF THE CASE

Paul J. Greco, the Respondent, brought suit in the Federal District Court, Middle District of Florida, in Jacksonville, under the Federal Employers' Liability Act, 45 U.S.C.A. § 1-60. The pleadings followed the usual course including Motions, Answer, discovery proceedings, pre-trial conference and a 12-member jury trial. At the end of the evidence, motions for directed verdict by both parties were denied.

The trial began on June 28, 1972. On June 30, prior to closing arguments by both parties, various requested instructions were submitted to the trial court.

The Petitioner requested the trial court to instruct the jury that in the event they should award any compensatory damages to the Respondent that those damages would not be subject to Federal Income Taxes and that the jury should not, therefore, add or subtract taxes in fixing the amount of any award, citing *Domeracki v. Humble Oil & Refining Co.*, 443 F.2d 1245 (3 Cir. 1971); cert. denied, 404 U.S. 883; 30 L.Ed. 2d 165; 92 Sup. Ct. .....

The trial court refused to give said instruction and the jury retired to begin deliberations. While in deliberation, the jury sent a question to the Court inquiring as to whether or not there was income tax on an award of this type. The jury also inquired as to what percentage of the award Respondent's attorney would receive. The trial court's reply was to the effect that they were not to consider either of these matters in reaching their verdict. As to the jury's income tax question there is no doubt, as a matter of law, that this was an erroneous reply. Shortly thereafter, the jury returned a verdict of $350,000.00 in favor of the Respondent.

Subsequent post-trial proceedings clearly showed that at least one juror added an additional amount to the verdict to compensate for Federal Income Taxes that she erroneously believed would be levied against the verdict amount. Following timely post-trial Motions and Hearings on same, the trial court denied all of Petitioner's Motions in toto.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, seeking reversal of the Final Judgment entered on the verdict. On July 12, 1972, United States Court of Appeals for the Fifth Circuit rendered a judgment affirming the District Court. (Appendix "C").

Petitioner then filed its Petition for Rehearing and Petition for Rehearing En Banc with the United States Court of Appeals for the Fifth Circuit which was denied on October 11, 1972. (Appendix "A").

REASONS FOR GRANTING THE WRIT

WAS THE PETITIONER ENTITLED TO HAVE THE JURY CHARGED THAT ANY COMPENSATORY DAMAGES AWARDED TO RESPONDENT WERE NOT SUBJECT TO INCOME TAX?

Petitioner respectively submits that it was entitled to have the jury informed and instructed that compensatory damages are not subject to income tax. It is abundantly clear in this case that the jury was aware and conscious of the impact of income taxes in today's society as they specifically required of the Court if there were income taxes on an award of this type.

FIFTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH THE THIRD CIRCUIT'S DECISION ON THE SAME MATTER.

The United States Court of Appeals for the Fifth Circuit's Decision in this case flies directly into the face of the United States Court of Appeals for the Third Circuit's Decision on the identical point.

The Fifth Circuit's opinion in this case, as in their prior decisions, clearly shows that they have failed to consider, in depth, the logic or reasons why such an instruction should be given. In this case the Fifth Circuit stated:

> "We find no error in the District Court's refusal to instruct the jury that any award to Greco in the case would not be subject to Federal Income tax. The refusal was proper and follows prior decisions of this Court. See *Cunningham v. Bay Drilling Co.*, (5 Cir. 1970), 421 F.2d 1398; *Prudential Insurance Co. of America v. Wilkerson*, (5 Cir. 1964) 327 F.2d 997."

In *Cunningham*, the Fifth Circuit said only:

> "The Second Complaint Appellant makes is to the Court's refusal to give a charge instructing the jury that any award for damages would not be subject to payment of Federal or State Income Taxes. We believe the refusal was proper."

And in *Prudential*, the Fifth Circuit addressed itself to the point, saying only:

> "We are of the opinion the Court properly refused to instruct the jury that the amount of the recovery was not subject to Federal or State Income Taxes and that the trial in other respects was free from prejudicial error."

The only Fifth Circuit opinions on this point which indicate an indepth look into the matter indicate that their decisions have been unrealistic concerning this point. See Chief Judge Brown's footnote to the Opinion in the instant case as well as his dissenting opinion in the denial of the Petition for Rehearing and Petition for Rehearing En Banc and Judge O'Sullivan's dissent in *Laird v. Hudson Engineering Co.*, 449 F.2d 216 (5 Cir. 1971).

On May 18, 1971, the Third Circuit Court of Appeals, handed down its decision regarding this point in the case of *Domeracki v. Humble Oil and Refining Co.*, 443 F.2d 1245 (3 Cir. 1971); cert. denied, 404 U.S. 883; 30 L.Ed. 2d 165; 92 S.Ct. ..... After thoroughly reviewing the question, including a review of State and Federal Court decisions on the point, the Third Circuit's decision stated on page 1251:

> "Given the absence of complications that an instruction would engender the tax consciousness of the American

public, and the general lack of knowledge about the Statutory exclusion, we hold that in personal injury actions the Trial Courts in this Circuit must, in the future, upon request by counsel, instruct the jury that any award will not be subject to Federal Income Taxes and that the jury should not, therefore, add or subtract taxes in fixing the amount of any award."

It was on the basis of the Third Circuit's opinion in *Domeracki*, supra, that the Petitioner requested its income tax instruction on June 30, 1971, in this Federal Employer's Liability Act case.

OTHER CIRCUITS POSITIONS

The United States Court of Appeals for the Second Circuit has held that such an instruction is proper. See *McWeeney v.New York, N.H. & H. R. Co.*, (2 Cir. 1960), 282 F.2d 34; cert. denied, 81 S.Ct. 115, 364 U.S. 870, 5 L.Ed. 2d 93.

The United States Court of Appeals for the Sixth Circuit has held that refusal to give such an instruction is not error. See *Payne v. Baltimore & Ohio R. Co.*, (6 Cir. 1962), 309 F.2d 546, cert. denied, 374 U.S. 827, 83 S.Ct. 1865, 10 L.Ed. 2d 1051.

Federal District Courts in the Fourth Circuit and the Ninth Circuit have given such an instruction. See *Plant v. Simmons Co.*, 321 F. Supp. 735 (D.C. Md., 1970); *Anderson v. United Airlines, Inc.*, 183 F. Supp. 97 (S.D. Cal., 1960).

Section 104 of the Internal Revenue Code of 1954, 26 U.S.C.A., clearly provides that awards for compensatory damages in personal injury actions are not subject to Federal Income Tax. Prior to Petitioner requesting such an instruction

in the instant case, the United States Court of Appeals for the Third Circuit had ruled that such an instruction must be given, if requested. Therefore, Petition submits that it was entitled to have the jury charged that any compensatory damages awarded to Respondent were not subject to income tax.

DID THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY, IN AN ACTION UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT, THAT COMPENSATORY DAMAGES AWARDED TO RESPONDENT WERE NOT SUBJECT TO FEDERAL INCOME TAX DEPRIVE THE PETITIONER OF DUE PROCESS OF LAW AS PROVIDED FOR BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

It is, of course, well settled that Federal Law applies to actions tried under the Federal Employer's Liability Act.

As previously stated, Petitioner's case was tried in June, 1971. Petitioner submitted its requested instruction to the Court citing the *Domeracki* decision. Had Petitioner's trial been held within a District encompassing the jurisdiction of the Third Circuit Court of Appeals, a denial of the requested instruction would have constituted reversible error.

However, the Fifth Circuit had held, and by its opinion in this case continues to hold, that such an instruction is properly denied. The Fifth Circuit's position has denied this Petitioner the right to have the jury fully informed as to the law so that they could properly fulfill their function in arriving at a fair compensatory award. Indeed, testimony from a juror during post-trial proceedings showed that the award had been increased to take care of taxes.

Therefore, the position of the Fifth Circuit on this point deprived this Petitioner a fair trial and violated its right to due process as provided for by the Fifth Amendment of the United States Constitution.

CONCLUSION

Because of the direct conflict on this point between the Fifth Circuit and Third Circuit and the divergent positions of other Circuit and District Courts, it is respectfully submitted that a Writ of Certiorari should be granted. Further a Writ of Certiorari should issue because Petitioner's right to a fair trial and due process has been violated.

Respectfully submitted,

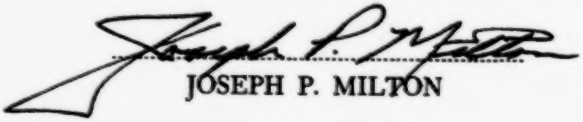
JOSEPH P. MILTON
CLARK W. TOOLE, JR.

Toole, Taylor, Moseley, Gabel & Milton
Suite 1014, Barnett Bank Building
Jacksonville, Florida 32202

By
JOSEPH P. MILTON
Counsel for Petitioner

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, has been furnished to Alan P. Schwartz, Esquire, 410 Concord Building, Miami, Florida 33130, and Jesse D. Henry, Esquire, H. R. Stroemer, Esquire, Biscayne Building, 151 S.W. 1st Street, Miami, Florida 33130, Attorneys for Respondent, by U.S. Mail, postage prepaid, this 5th day of January, A.D., 1973.



JOSEPH P. MILTON

APPENDIX

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3522

PAUL J. GRECO,

Plaintiff-Appellee,

versus

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion July 12, 1972, 5 Cir., 1972, 464 F.2d 496)

(October 11, 1972)

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of

the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

BROWN, Chief Judge, with whom DYER and SIMPSON, Circuit Judges join, dissenting:

I dissent from the denial of rehearing en banc. The practice of keeping the jury in the dark on the non-taxability of awards for lost income and future earning capacity should be reconsidered by the full Court. The jury's ignorance as to the effect of taxation produces verdicts which do not reflect realities of the financial injuries which a plaintiff, including this plaintiff, has endured.[1]

I do not mean to imply that plaintiff's verdicts in general – except insofar as they cause receipt of income which would have otherwise been diverted into the general coffers – are too large, nor that the plaintiff here was overcompen-

---

[1]The jury below apparently increased plaintiff's award in order to compensate for taxation. Greco v. Seaboard Coast Line Railroad Co., 5 Cir., 1972, ____ F.2d ____ [No. 71-3522, July 12, 1972].

sated for the other elements of damage. What I do protest is the court being a participant in an undertaking the rules of which compel it to remain silent, when silence almost necessarily becomes deceit. Indeed, it would be more characteristic of the law's quest for truth to ordain a substantive rule that the jury be openly and honestly instructed to award gross wages lost, but under a rule which supposes recovery of net losses it is most unseemly for a court of law to refuse to hear, see or speak the truth.

We should unmuzzle ourselves from our prior cases which make a trial judge and us a part of a charade. That would also put us in tune with the times[2] – an awareness by the very young to the aged that federal income taxes are not only a certain fact of life, but they are, and most assuredly will be big, if not bigger.

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[2]Indeed, it would put us in tune with the holdings of a number of other courts. The excellent opinion of Judge Aldisert for the Third Circuit in Domeracki v. Humble Oil & Refining Co., 3 Cir., 1971, 443 F.2d 1245 contains a catalog of authorities and learned commentary. We should heed his statement that "what we know as men we should not ignore as judges", an observation I have voiced on several occasions, see, e.g., Hamer v. Campbell, 5 Cir., 1966, 358 F.2d 215, 220 and Brooks v. Veto, 5 Cir., 1966, 366 F.2d 1, 10, 12 (en banc).

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc, N. O., La.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3522

Summary Calendar*

PAUL J. GRECO,

Plaintiff-Appellee,

versus

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

(July 22, 1972)

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

PER CURIAM: A judgment of $350,000.00 was entered on a jury verdict against appellant Seaboard Coast Line Rail-

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*Rule 18, 5th Cir; See *Isbell Enterprises, Inc.* v. *Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F. 2d 409, Part I.

road Company in favor of appellee Paul Greco, one of its employees who brought the action under the Federal Employees Liability Act and also the Safety Appliance Act.

Seaboard asserts error because the district court refused to instruct the jury that any award to Greco in the case would not be subject to federal income tax, and that the district court erred in denying the defendant's motion for a new trial or a remittitur on the award.

We find no error in the district court's refusal to instruct the jury that any award to Greco in the case would not be subject to federal income tax. The refusal was proper and follows prior decisions of this court. See *Cunningham* v. *Bay Drilling Co.*, 5 Cir. 1970, 421 F. 2d 1398; *Prudential Insurance Co. of America* v. *Wilkerson*, 5 Cir. 1964, 327 F. 2d 997.

A review of the record on the damage issue supports the determination of the jury on this question, and the exercise of the district court's discretion in declining to disturb it. Suffice it to say that Greco, 40 years of age, earning approximately $8,000.00 per year, lost his leg by amputation at a time when he had a life expectancy of 31 years. Added to this was past earnings loss, substantial past and future medical expenses, together with pain and suffering. We conclude that the action of the district court in refusing the new trial or to grant a remittitur on the ground that the verdict was excessive should not be disturbed. See *Grunenthal* v. *Long Island R. Co.*, 393 U.S. 156, 21 L.Ed. 2d 309, 89 S.Ct. 331.

We find no errors as asserted to the district court's other post-trial rulings and conclude that the trial in other respects was free from prejudicial error.

AFFIRMED.[1]

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[1]The Chief Judge, concurring in the decision and the opinion on the basis of *Cunningham* and *Wilkerson*, *supra*, thinks those cases should be reconsidered. Theirs is an unrealistic holding since all know today that taxes are even more certain than death, certainly to the living. Jurors unconsciously consider the spector of taxation on a damage award and since such awards are expressly exempt the jurors should be told so explicitly. Indeed the jury here made express inquiry of the Court after deliberation and the Court declined to give any instruction. Following the receipt of the verdict, testimony on a post-trial motion from a juror showed that the award had been boosted to take care of taxes in the mind of the testifying juror.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc, N. O., La.

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-3522
Summary Calendar

D. C. Docket No. 70-126

PAUL J. GRECO,
Plaintiff-Appellee,

versus

SEABOARD COAST LINE RAILROAD COMPANY,
A Virginia corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before BROWN, Chief Judge, GOLDBERG and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendant-appellant pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 12, 1972

Issued As Mandate:

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

NO. 70-126-Civ-J

PAUL J. GRECO,

Plaintiff,

vs.

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia corporation,

Defendant.

ORDER

The parties having been heard, after due notice, it is

ORDERED:

1. Defendant's motion for judgment notwithstanding verdict or, in the alternative, for new trial, or remittitur is denied.

2. Plaintiff's motion for taxation of costs is granted to the extent of $1,104.20, for which amount plaintiff has judgment of and from defendant, Seaboard Coast Line Railroad Company, for which let execution issue.

3. The parties having stipulated to the amount of the supersedeas bond, the same is hereby set at $380,000.00.

4. Plaintiff's motion to cite Clark W. Toole, Jr., in contempt of Court is denied.

5. Plaintiff's and defendant's motions directed to the interviewing of jurors are moot.

DONE and ORDERED at Jacksonville, Florida, this 11th day of October, 1971.

/s/ Gerald Bard Tjoflat
JUDGE

Copies:
Jesse D. Henry, Esquire
Clark W. Toole, Jr., Esquire

APPENDIX E

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

No. 70-126-Civ-J

PAUL J. GRECO,

Plaintiff,

-vs-

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia corporation,

Defendant.

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL, OR, REMITTITUR

Pursuant to the Federal Rules of Civil Procedure, the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a corporation, by and through its undersigned attorneys, moves the Court to set aside the Verdict entered in the above-entitled action on June 30, 1971, and the Judgment entered thereon, and to enter judgment in favor of the Defendant, SEABOARD COAST LINE RAILROAD COMPANY, a corporation, in accordance with the Defendant's Motion for Directed Verdict made at the close of Plaintiff's case and renewed by the Defendant at the close of all the testimony herein on the following grounds, to wit:

* * *

17. The Court erred in refusing to give the jury the Defendant's Requested Instructions regarding Federal Income

Taxes as follows:

> ...."The Court instructs the Jury that in the event you should award compensatory damages to the Plaintiff in this case, that any award will not be subject to Federal Income Taxes and that the Jury should not, therefore, add or subtract taxes in fixing the amount of any award." *Domeracki v. Humble Oil and Refining Company,* 3rd Cir. U.S.C.A., 5/18/71, 39 Law Week, 2659.

* * *

KURZ, TOOLE, TAYLOR, MOSELEY & GABEL

By /s/ Clark W. Toole, Jr.
Clark W. Toole, Jr.
Attorneys for Defendant
Suite 1014 Barnett Bank Building
Jacksonville, Florida 32202

Filed July 7, 1971

APPENDIX F

United States District Court

FOR THE
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil Action File No. 70-126-Civ-J

PAUL J. GRECO

vs.

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia Corporation

JUDGMENT

This action came on for trial before the Court and a jury, Honorable GERALD BARD TJOFLAT, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

That the plaintiff PAUL J. GRECO, recover of the defendant SEABOARD COAST LINE RAILROAD COMPANY, a Virginia Corporation, the sum of THREE HUNDRED FIFTY THOUSAND AND NO/100 ($350,000.00) DOLLARS with interest thereon at the legal rate as provided by law and his costs of action .....

Dated at Jacksonville, Florida, this 30th day of June, 1971.

WESLEY R. THIES, CLERK
/s/ Frank Hendersen, Jr.
Deputy Clerk of Court

Filed June 30, 1971

CC: Jesse D. Henry, Esq. Henry & Stroemer
151 S. W. First Street, Miami, Florida 33130
Clark W. Toole, Jr., Esq. Kurz, Taylor, Moseley & Gabel
1014 Barnett Bank Bldg., Jacksonville, Florida 32202

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-967

SEABOARD COAST LINE RAILROAD COMPANY,
a Virginia Corporation,
Petitioner,

vs.

PAUL J. GRECO,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The petitioner, Seaboard Coast Line Railroad Company, seeks review by petition for writ of certiorari, pursuant to 28 U.S.C., § 1254(1) of the decision of the United States Court of Appeals for the Fifth Circuit in *Greco* v. *Seaboard Coast Line R. Co.*, 5 Cir. 1972, 464 F. 2d 496, petition for rehearing and petition for rehearing in banc denied (12-3), 5 Cir. 1972, 468 F. 2d 822. The decision affirmed a jury verdict and judgment recovered by the plaintiff-respondent, Greco, in a personal injury action under the provisions of the Federal Employers' Liability Act, 45 U.S.C.A., § 51, et seq., and the "grab iron" section of the Safety Appliance Act, 45 U.S.C.A., § 4. Insofar as is now

relevant,[1] the decision below held that the District Court had not committed reversible error in its "refusal to instruct the jury that any award to Greco in the case would not be subject to federal income tax. The refusal was proper and follows prior decisions of this Court. See *Cunningham* v. *Bay Drilling Co.*, 5 Cir. 1970, 421 F. 2d 1398; *Prudential Insurance Company of America* v. *Wilkerson*, 5 Cir. 1964, 327 F. 2d 997."

The case arose on February 6, 1970, at Pecan, Clay County, Florida, when the respondent, who was then forty years of age and a trainman-flagman employed by the Seaboard, fell from a car with a grab iron or ladder rung with an allegedly inadequate clearance. As a result, his left leg was run over by the car—soon thereafter, it was amputated below the knee. Greco sued the railroad in the United States District Court for the Middle District of Florida in Jacksonville.

At the conclusion of the two and a half day trial, during which there was no mention whatever of the "issue" of federal income taxes either as they bore upon Mr. Greco's earnings or upon any verdict or judgment he would receive in the case itself, the railroad requested a jury instruction to the effect that

> ". . . any award will not be subject to Federal Income Tax and that the jury should not, therefore, add or subtract taxes in fixing the amount of any award."

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1. The Fifth Circuit also rejected the railroad's appellate claim that the jury verdict of $350,000 for the loss of plaintiff's leg was "excessive." It also rejected, without discussion, the railroad's other contentions that the trial judge had committed reversible error in his restriction of defense counsel in interviewing the trial jury as to the manner and method at which it had arrived at its verdict and in the conduct of a post-trial "evidentiary hearing" at which, over the strenuous objection of the plaintiff, *the Court* interrogated the jurors concerning these aspects of the verdict. None of these holdings are now challenged in the pending petition for writ of certiorari here.

At the charge conference, the trial judge declined to give this requested instruction.

Soon after retiring, the jury submitted a "question" to the Court in which it asked for the "figures submitted by Mr. Henry [plaintiff's counsel] on Mr. Greco's behalf. . . ." The Court, without objection, declined to give the jury "a specific response to the question." Shortly thereafter, the jury returned with two additional questions concerning both income tax and attorneys' fees. The record on this issue clearly demonstrated the railroad counsel's lack of trial objection to the Court's response to these questions:

"THE COURT: We have another question. They want to know about income tax.

" 'Is there income tax on an award of this type? What percentage will Mr. Greco's attorney receive of the amount awarded?'

"MR. HENRY: A fair share.

"THE COURT: If I call them in, I will tell them the matter of federal income tax is not to be considered by them one way or another.

"MR. HENRY: Yes, sir.

"THE COURT: And neither is the matter of attorney's fee or Court costs. I can either write that back or call them in.

"MR. TOOLE: Write it back.

"THE COURT: I would rather write it back because sometimes they will pop a question before you can shut them up.

"MR. TOOLE: I would send them another note.

"THE COURT: I have composed the following response:

" 'Ladies and gentlemen, you shall not consider the matter of federal income taxes one way or the other in this case. Taxes are in no respect involved. Likewise, you should not consider the matter of attorney's fees or Court costs in arriving at your verdict.'

"MR. HENRY: Can you put after the word 'involved' as an issue in this case?

"MR. TOOLE: I don't think you should even say that much.

"THE COURT: It is not involved, just not involved.

"MR. HENRY: All right.

"THE COURT: They have nothing to think about, just say 'not involved.'

"MR. TOOLE: If you gave my instruction, you would have eliminated that.

"THE COURT: Maybe so. I will sign my name to that. Put that in an envelope, Mr. Marshal, and we will file as Court's Exhibit to the second question.

"(The instrument last above-referred to was received in evidence as Court's Exhibit No. 2.)"

Upon being so instructed, clearly without objection, the jury, after further deliberation returned a $350,000 verdict for the plaintiff. At the railroad's request the jury was polled and each of the jurors responded that the verdict rendered was in fact his verdict.

The verdict was returned in the morning of June 30, 1971. On July 7, 1971, the railroad filed its post-trial motions in the case. Its claim for a new trial was supported in part by an affidavit—secured on July 3, 1971—by one of the jurors, Mrs. Myrtle L. Mills of Live Oak, Florida,

who alone had executed a railroad form affidavit prepared for all of the jurors that

> "Attorneys' fees, Court costs and income taxes were included in the Verdict for plaintiff in the above case."

The defendant's post trial motions were heard before the District Judge on September 30, 1971. Six of the twelve jurors—including all four of those whose specific names had been mentioned in the motion for a new trial, Mills, Jones, Crabb and Doyle—were subpoenaed to the hearing. Although the Trial Court determined to disregard entirely the Mills *affidavit*, over objection of counsel for the plaintiff, he decided to inquire whether each of the jurors who were present had followed the instruction in question.

What followed involved what must be a virtually unique proceeding in federal judicial history. The six jurors were seriatim asked by the Court whether, in accordance with his instruction, they had or had not ignored, included or discussed the issues of federal income tax, attorneys' fees and court costs in rendering the verdict in the case. Of the six, four jurors—Jones, Howell, Doyle and Crabb—clearly stated that the instruction had been followed and that there had been neither subsequent discussion nor inclusion in the verdict of an allowance for income tax. One juror, of course, Mrs. Mills, was extremely confused as to what had happened and whether or in what amount an income tax attorneys' fee allowance had been included in the verdict. She was able to recall that the jurors had been talking about the "$350,000 covering his living expenses from here on." She finally indicated that although there was "not too much" discussion of the matter subsequent to the Court's instruction, she "was thinking that that included everything

when your instruction said not"—whatever that means. The sixth juror, Mr. Massouh,[2] not at all surprizingly, could not even remember the jury's question or the Court's answer to it. At the conclusion of the hearing, the Trial Judge accurately summarized the jurors' testimony as follows:

> "The first lady [Mrs. Mills] said she was confused and the others say they didn't make an award. . . ."

On the basis, in obviously large part, of the evidentiary hearing concerning the "issue" of whether the jurors had in fact added to their verdict an amount which represented a federal income tax payment on the award, and his apparent conclusion that no such thing had in fact been demonstrated, the Trial Judge denied the railroad's post-trial motions. As we have noted, the Fifth Circuit rejected Seaboard's claim that it was entitled to a new trial because the District Judge had committed reversible error in denying its initial requested instruction on the "income tax" question.

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2. Mr. Massouh, in the course of his interrogation stated that:

> "Some lady brought up that they came to a figure and they took 25% off to get to that figure, 350. That was all that was mentioned, sir."

This comment, together with the statement of Mr. Howell that, prior to the jury question, he had said that he "didn't think the insurance money was taxable to start with" indicates that, if anyone was prejudiced by the income tax issue, it was the plaintiff; and that if the jury had considered the taxation issue at all, it had done so by *reducing* its verdict by a given amount which gave the plaintiff what the jury thought he was entitled to after taxes. The possibility that this might happen—that is, the likelihood that the jury, disagreeing with Congress, might deduct taxes from what it would otherwise have awarded—is, of course, one of the primary arguments advanced for not giving the "income tax" instruction at all. See, e.g., especially *Hall* v. *Chicago & N.W. R. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77, 86; *Dixie Feed & Seed Co.* v. *Byrd*, 52 Tenn. App. 619, 376 S.W. 2d 745, 749, app. dis., 379 U.S. 15.

QUESTIONS PRESENTED

The railroad presents what purport to be two questions for review by this Court. The second "question," to the effect that the denial of its requested instruction somehow deprived the railroad of "due process of law" under the Fifth Amendment to the United States Constitution is so patently devoid of merit[3] that no specific discussion or reply is even appropriate. The first "question," it is submitted, may properly be rephrased, in terms of what is specifically involved in this particular case as follows:

> Whether the District Judge committed reversible error, under the circumstances of this case, in declining negatively to instruct the jury that any award to the plaintiff would *not* be subject to federal income tax.[4]

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3. Undoubtedly because of this fact, it was not raised or otherwise preserved in the District Court and was not even referred to by the Fifth Circuit, before which the railroad did belatedly so contend.

4. This question is virtually identical to the one framed by Greco as appellee, before the Fifth Circuit and was, in essence, the only "question" which was answered by that Court.

ARGUMENT

Respondent contends that the question presented does not justify certiorari review, on the merits, by this Court. This is so essentially because

(a) The decision below—that no reversible error was committed in denying the requested "income tax" instruction—is in accordance with the overwhelming weight of authority throughout the nation and is in reality not in conflict with the decision of any other Circuit Court of Appeals;

(b) Even an acceptance of the petitioner's contentions on the merits of the propriety of the instruction could properly be only of prospective effect, so that this Court's decision in the cause could amount to no more than an essentially advisory opinion; and

(c) Under the particular circumstances of the case, the petitioner may not claim harm and thus secure a reversal because of the denial of the requested instruction.

1. The holding of the Fifth Circuit is, as we have indicated, in full accord with the vast and overwhelming weight of authority throughout the nation on the point. See Annotation, 63 A.L.R. 2d 1393, 1407, 1418. Among the states, most jurisdictions hold or state for various reasons that it is or would be error even to grant the instruction.[5] *Mitchell* v. *Emblade,* 80 Ariz. 398, 298 P. 2d 1034;

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5. Many, perhaps most, of the state court cases involve F.E.L.A. actions which are governed, of course, by substantive federal law.

Atlantic Coast Line R. Co. v. *Brown*, 93 Ga. App. 805, 92 S.E. 2d 874; *Hall* v. *Chicago & N.W. Ry. Co.*, 5 Ill. 2d 135, 125 N.E. 2d 77 (leading case cited and quoted in several later cases in other jurisdictions); *Wagner* v. *Illinois Central R. Co.*, 7 Ill. App. 2d 445, 129 N.E. 2d 771; *Highshew* v. *Kushto*, 235 Ind. 505, 134 N.E. 2d 555; *Spencer* v. *Martin K. Eby Construction Co.*, 186 Kan. 345, 350 P. 2d 18; *Louisville & Nashville R. Co.* v. *Mattingly*, Ky. 1958, 318 S.W. 2d 844; *Briggs* v. *Chicago Great Western Ry. Corp.*, 248 Minn. 418, 80 N.W. 2d 625; *Bracy* v. *Great Northern Ry. Co.*, Mont. 1959, 343 P. 2d 848, cert. den., 361 U.S. 894; *Missouri-Kansas-Texas R. Co.* v. *McFerrin*, Tex. Civ. App. 1955, 279 S.W. 2d 410; reversed on other grounds with specific affirmance of the lower court on this point, 156 Tex. 69, 291 S.W. 2d 931; *Hardware Mutual Casualty Co.* v. *Harry Crow & Son, Inc.*, 6 Wis. 2d 396, 94 N.W. 2d 577. Many of the bases for this rule were still stated by the Supreme Court of Errors of Connecticut in one of the most recent cases on the subject, *Gorham* v. *Farmington Motor Inn, Inc.*, 159 Conn. 576, 271 A. 2d 94, 96-97 (1970):

> "Error has been assigned in the court's failure to charge, as the defendant requested, that any award given the plaintiff is tax-free and not subject to any income tax whatever. The great weight of authority in the United States is committed to the rule that, in an action to recover damages for personal injuries, an instruction such as is now under consideration is improper and, when requested, should be refused. [Citing cases.]
>
> "The defendant relies heavily on Dempsey v. Thompson, 363 Mo. 339, 251 S.W. 2d 42, wherein the Missouri court held it proper to instruct the jury that any award of damages is not subject to federal income tax and that said tax should not be considered in fix-

ing the amount of damages. We do not concur with the holding in the Dempsey case. The majority rule is to the contrary. The injection of the question of income tax liability is likely to give rise to more problems than it would solve. See Spencer v. Martin K. Eby Construction Co., supra, 186 Kan. 350-354, 350 P. 2d 18, where the leading cases are collected and considered. Rejecting the rule in the Dempsey case, the Illinois Supreme Court in Hall v. Chicago & N.W. Ry. Co., supra, 5 Ill. 2d 151, 125 N.E. 2d 86, said: 'It is a general principle of law that in the trial of a lawsuit the status of the parties is immaterial. Thus, what the plaintiff does with an award, or how the defendant acquires the money with which to pay the award, is of no concern to the court or jury. Similarily [sic], whether the plaintiff has to pay a tax on the award is a matter that concerns only the plaintiff and the government. The tort-feasor has no interest, in such question.' The defendant's contention that, if the instruction is not given, the jury are likely to adjust their verdict upward to offset any income tax liability is based on an unjustified assumption that the jury will not confine themselves to the evidence or to the court's charge. 'This is to assume that there will be misconduct on the part of the jury, an assumption in which we cannot indulge.' Missouri-Kansas-Texas R. Co. v. McFerrin, 279 S.W. 2d 410, 419 (Tex. Civ. App.), rev'd on other grounds, 156 Tex. 69, 291 S.W. 2d 931.

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"We conclude that the court did not err in refusing to charge as requested by the defendant."

In many other state court cases the action of the trial judge in declining such an instruction has been specifi-

cally approved. This is the rule, for example, in F.E.L.A. actions tried in the state courts of Florida—the location of the trial below. *Atlantic Coast Line R. Co.* v. *Braz*, Fla. App. 1966, 182 So. 2d 491, 494, quashed on other grounds, Fla. 1967, 196 So. 2d 109 (refusal of charge within discretion of trial court); *St. John's River Terminal Co.* v. *Vaden*, Fla. App. 1966, 190 So. 2d 40, cert. den., Fla. 1967, 200 So. 2d 814 (same). Accord, e.g.: *Henninger* v. *Southern Pacific Co.*, 250 Cal. App. 2d 872, 59 Cal. Rptr. 76, 81 (proper to refuse charge); *Kawamoto* v. *Yasutake*, Haw. 1966, 410 P. 2d 976, 981 (same); *Chicago R. I. & P. R. Co.* v. *Kinsey*, Okla. 1962, 372 P. 2d 863 (same); *Dixie Feed & Seed Co.* v. *Byrd*, 52 Tenn. App. 619, 376 S.W. 2d 745, 749 (same); *Stallcup* v. *Taylor*, Tenn. App. 1970, 463 S.W. 2d 416, 422; *Crum* v. *Ward*, W. Va. 1961, 122 S.E. 2d 18, 30-31 (same); *Behringer* v. *State Farm Mutual Auto Ins. Co.*, 6 Wis. 2d 595, 95 N.W. 2d 249 (same); see also *Bergfeld* v. *N. Y., Chicago & St. Louis R. Co.*, 103 Ohio App. 87, 144 N.E. 2d 493; *Maus* v. *N. Y., Chicago & St. Louis R.* Co., 165 Ohio State 281, 135 N.E. 2d 253.

The federal cases on the subject likewise hold that it is not reversible error to decline to grant such an instruction.[6] *Prudential Insurance Co.* v. *Wilkerson*, 5 Cir. 1964, 327 F. 2d 997; *Cunningham* v. *Bay Drilling Co.*, 5 Cir. 1970, 421 F. 2d 1398, 1399; *McWeeney* v. *New York, N.H. & H.R. Co.*, 2 Cir. 1960, 282 F. 2d 34, 39-40, cert. den., 364 U.S. 870 (no reversible error in declining requested instruction in F.E.L.A. case); *New York Central R. Co.* v. *Delich*, 6 Cir. 1958, 252 F. 2d 522, 527 (same); *Payne* v. *Baltimore &*

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6. It must be emphasized that the Fifth Circuit did not hold below, and has not held, that it is error to *grant* such an instruction; it has determined merely that—whether approached in terms of the trial judge's discretion to grant or not to grant the charge or otherwise—the District Judge's ruling on the subject cannot form the basis of a determination of *reversible* error.

Ohio R. Co., 6 Cir. 1962, 309 F. 2d 546, 549-550, cert. den., 374 U.S. 827 (same).[7]

Even the single Court of Appeals decision which announces—only *prospectively*—a contrary rule, *Domeracki* v. *Humble Oil & Refining Co.*, 3 Cir. 1971, 443 F. 2d 1245, cert. den., 404 U.S. 883, specifically does not hold that the failure to give the instruction constituted reversible error in the case itself. Indeed, it *affirmed* the judgment below, although the instruction had been specifically requested and specifically denied in the trial; this result was avowedly, see 443 F. 2d at 1252, based in large part upon the fact that it was impossible properly to determine that, in fact, the jury had been improperly motivated to increase its award "based on mistaken considerations of tax consequences."[8]

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7. One District Court opinion, reflecting the discretion of the District Judge, states that the instruction would not be given, *Combs* v. *Chicago St. P. M. & O. R. Co.*, D. Iowa 1955, 135 F. Supp. 750. In *Anderson* v. *United Airlines, Inc.*, S.D. Cal. 1960, 183 F. Supp. 97, the District Judge exercised his discretion, under the circumstances of the case, to grant such a charge. In *Plant* v. *Simmons Co.*, D. Md. 1970, 321 F. Supp. 735, 740, the District Judge stated that he would instruct the jury in that case similarly to the re-instruction granted by the District Judge in this one, not to "consider income taxes in any way. . ." Of course, there is no "conflict" among these decisions—the essential holding in each case is that the charge may or may not be granted within the discretion of the District Judge.

8. The Third Circuit also based its affirmance and the only prospective application of the holding that the "income tax" instruction should be given upon the virtually unanimous prior authority to the contrary in the past. Both of these considerations would plainly be applicable to this case.

In *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W. 2d 42, the Missouri Supreme Court likewise held only prospectively that the instruction should be given in future cases, and nevertheless affirmed the jury verdict and judgment below. There seems to be only a single jurisdiction, Delaware, in which the refusal of the requested instruction has been held to be reversible error. *State Highway Department* v. *Buzzato*, Del. 1970, 364 A. 2d 347, 351; *Abele* v. *Massi*, Del. 1970, 273 A. 2d 260.

The lack of "cert.-worthiness" as to these almost unanimous holdings that the failure to give the charge will not result in a new trial is demonstrated by this Court's consistent refusal to review such decisions. E.g., *McWeeney* v. *New York, N.H. & H.R. Co.*, supra; *Payne* v. *Baltimore & Ohio R. Co.*, supra; *Domeracki* v. *Humble Oil & Refining Co.*, supra; *Bracy* v. *Great Northern R. Co.*, supra. Just this term, in *New York Central R. Co.* v. *Raines*, Case No. 72-315, ... U.S. ....., 34 L. Ed. 2d 247 (1972), the Court denied certiorari to review the decision of the Illinois Supreme Court in *Raines* v. *New York Central R. Co.*, Ill. 1972, 283 N.E. 2d 230, 232, in which that Court, reinstating a $750,000 F.E.L.A. jury verdict and judgment for the plaintiff, again held that the instruction in question was properly refused.

2. The fact that the *Domeracki* case resulted—on a finding of no reversible error—in an affirmance of the verdict and judgment below demonstrates that there is in fact no "real" conflict between the Third Circuit and the Fifth Circuit on the issue involved here. See *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70.[9] Moreover, the affirmance in *Domeracki* demonstrates both that the

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9. Of course, in *Domeracki* the Court of Appeals announced, primarily in the exercise of its supervisory powers over the District Courts within its circuit, a prospective rule that the charge should be given in the future (it did not say that the failure to do so would result in reversible error); the Fifth Circuit, in this case, did not announce such a rule. It is submitted both that this fact does not create a "conflict" between the circuits as to their *holdings* on the issue; and that, to the extent that different rules may prevail in the future in the two circuits (although there is nothing to preclude District Judges in the Fifth Circuit from granting the charge in the future), this involves merely an area in which the Circuit Court of Appeals may properly be permitted independently to exercise their supervisory jurisdiction within their respective circuits. Cf., this Court's consistent denials of certiorari form apparently conflicting decisions in the circuits concerning the applicable federal "insanity rule." *Carter* v. *United States*, 8 Cir. 1964, 332 F. 2d 728, cert. den., 379 U.S. 841; *Wion* v. *United States*, 10 Cir. 1963, 325 F. 2d 420, cert. den., 377 U.S. 946.

apparent difference in viewpoint between the Third and the Fifth Circuits is not one which concerns a significant or important issue—the grant or refusal of the instruction does not result in harmful error, in any case; and that the resolution of any so-called "conflict" would be irrelevant to the ultimate outcome of this case, a situation in which the Court has indicated that certiorari would not be granted even where an actual and "live" conflict in fact exists. See *Sommerville* v. *United States*, 376 U.S. 909, discussed in Stern & Gressman, Supreme Court Practice 158 (4th Ed. 1969).

In essence, even if successful on the merits, the petitioner could under the clear and impeccable reasoning of *Domeracki* secure only a prospective decision—"advisory" in that term's clearest sense—that the instruction should be given in the future. Neither the petitioner, nor the respondent, in terms of this particular case, would be "interested" on an adversary basis in such a result. Under these circumstances, the principles of this Court and of the Constitution which preclude advisory decisions militate strongly against the grant of certiorari here. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 229; *Flast* v. *Cohen*, 392 U.S. 83.

3. Finally, the proceedings in the District Court, both upon the jury's request for re-instructions and upon the jurors' post-trial interviews, show affirmatively that—in this particular case—the petitioner could not show harm in the denial of its initial requested instruction, and thus cannot squarely present the issue tendered for review to this Court. However, the issue might be resolved in another case, the facts *here* demonstrate

(a) That the railroad in fact secured the benefit of its requested instruction when the jury was re-instructed; and

(b) The petitioner cannot demonstrate prejudice or harm in any way from the denial of the requested instruction—insofar as the record (improperly) reveals the deliberations of the jury on this issue, it affirmatively demonstrates the *lack* of such prejudice.

(a.) The petitioner argues on the merits that it was entitled to have the jury informed that it was not to make any addition to its award by virtue of the jury's possible thought that the award would otherwise be subject to income taxes. It is plain, however, that just this result was accomplished when, without objection, the jury was specifically re-instructed that it "shall not consider the matter of Federal Income Taxes one way or the other in this case. . . ." It is, of course, well settled that a party may not claim prejudicial error in the denial of a requested jury instruction when the substance of that instruction is in fact given to the jury. E.g., *General Dynamics Corp.* v. *Adams,* 5 Cir. 1964, 340 F. 2d 271; *Bush* v. *Louisville & N. R. Co.,* 5 Cir. 1958, 260 F. 2d 854. That rule is clearly applicable here.

Under these circumstances, the fact of the re-instruction and its contents precluded any showing of error or harm in the denial of the petitioner's requested instruction which is the subject matter of the petition here. See *Plant* v. *Simmons Co.,* supra, cited by the railroad at page 8 of the petition, in which virtually the identical instruction was granted.

(b.) In this case the defendant "succeeded" over the plaintiff's objection, see *McDonald* v. *Pless,* 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300; *Domeracki* v. *Humble Oil & Refining Co.,* supra; cases collected, 6A Moore's Federal Practice § 59.08[4], pp. 3795-3796, 3811-3812, in actually having the jurors questioned by the Court as to their de-

liberations. This questioning, far from revealing prejudice, revealed the contrary. As we have noted, four of the six questioned jurors stated that the income tax issue had *not* been included in the verdict; one could not remember; and one, Mrs. Mills, was utterly confused. The railroad could, therefore, claim no error on this ground. In fact, the interrogation proved—so far as the railroad is concerned—too much. It revealed through juror Howell that he had told the jury what the railroad wanted the Court to tell it—that the award was not subject to income tax. If the jury could properly have been interviewed or questioned at all—and the respondent specifically argued that it could not have—the interrogation affirmatively demonstrated what the law would necessarily have revealed, that there was no impropriety and, even more, that there was no harm to the railroad as to any of the "income tax" issues.

REASONS FOR DENYING CERTIORARI

1. The decision below is in accordance with the overwhelming weight of authority throughout the nation in both the state courts and the Courts of Appeal.

2. There is no real conflict between the circuits on the issue presented for review here—the question of whether the trial judge committed reversible error in denying the requested instruction.

3. Even an acceptance of the petitioner's view of the theoretical merits of its position could not result in a reversal of the judgment below and the decision sought here is, therefore, merely an advisory one.

4. The issue does not concern one of sufficient importance to justify certiorari review by this Court.

5. The particular facts of this case—including supplemental instructions to the jury and its post-trial interviewing—precludes the petitioner from presenting the narrow and discreet question on the merits necessary for the granting of certiorari here.

CONCLUSION

It is respectfully submitted the petition for writ of certiorari should be denied.

Respectfully submitted,

JESSE D. HENRY
711 Biscayne Building
Miami, Florida 33130
Attorney for Respondent

Of Counsel:
ALAN R. SCHWARTZ
and
HORTON, SCHWARTZ & PERSE
and
HENRY & STROEMER
Miami, Florida 33130

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief of Respondent was mailed to Petitioner herein by placing same in the United States mail, properly addressed, postage prepaid, on this the 23rd day of February, 1973, to the attorneys named below:

MESSRS. CLARKE W. TOOLE, JR.
JOSEPH P. MILTON
1014 Barnett Bank Building
Jacksonville, Florida 32202

JESSE D. HENRY
Attorney for Respondent